

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE SESSION, 1996

DAVID IVY,)
)
 Appellant,)
)
)
 VS.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

C.C.A. NO. 02C01-9509-CR-00277

SHELBY COUNTY

HON. W. FRED AXLEY
JUDGE

(Post-Conviction Relief)

FILED

November 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant David Ivy appeals from the dismissal of his petition for post-conviction relief. On January 12, 1993, Appellant entered a negotiated plea of guilty to six indictments: three counts of aggravated assault, possession with intent to sell a controlled substance, second-degree murder, and especially aggravated robbery. Appellant agreed to a thirty-four (34) year sentence (twenty-five (25) years for the six indictments, to run concurrently with a conviction for attempted escape, and nine (9) years to be served consecutively for two previous convictions of aggravated assault). On November 24, 1993, Appellant filed a pro se petition for post-conviction relief, alleging ineffective assistance of counsel. Counsel was appointed for Appellant, and evidentiary hearings were held on July 7, 1994 and February 16, 1995. The post-conviction court dismissed the petition, finding that it was without merit. For the reasons discussed below, we reject Appellant's claim of ineffective assistance of counsel, and affirm the decision of the post-conviction court.

Appellant challenges counsel's representation in four respects. He asserts that counsel was ineffective because counsel failed to adequately investigate the case, to hold sufficient meetings with Appellant, to furnish Appellant with any pre-trial motions or pleadings, and to properly formulate an adequate trial strategy.¹

¹ As part of Appellant's claim that he received ineffective assistance of counsel, he alleges that his guilty plea was not knowingly, intelligently, and voluntarily entered because counsel forced him to plea guilty. Upon a review of the record, it does appear that the presiding judge at the guilty plea hearing failed to give some of the supervisory, non-constitutional instructions required by State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), when a plea of guilty is entered. However, relief may be given in a post-conviction hearing only if a conviction is void or voidable because of a violation of a constitutional right. Tenn. Code Ann. § 40-30-203 (Supp. 1996). Therefore, this issue has no merit.

When an appeal challenges the Sixth Amendment right to effective assistance of counsel, Appellant has the burden of establishing that the advice given or services rendered by the attorney fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). To prevail on a claim of ineffective assistance of counsel, a petitioner must show that his or her counsel's representation fell below the objective standard of reasonableness articulated in Baxter and, additionally, that this sub-standard representation prejudiced the defense. Strickland v. Washington, 466 U.S. 668 (1984). Prejudice is shown by demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694.

Before addressing the substance of Appellant's claim of ineffective assistance of counsel, we recognize that our scope of review is limited. Findings of fact made by the trial judge in post-conviction hearings are conclusive on appeal unless the appellate court finds that the evidence preponderates against the judgment. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983) (citing Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978)).

Appellant first alleges that counsel failed to fully and properly investigate the case. From the testimony counsel gave at the evidentiary hearing on February 16, 1995, it is obvious that counsel did not violate the standards of Baxter and Strickland in his investigation of the charges against his client. See Baxter, 523 S.W.2d 930; Strickland, 466 U.S. 668. Counsel testified as to the details of the charges brought by the State, mentioning names of witnesses whom he expected to testify. Counsel also contacted all of the witnesses of

which Appellant informed him, and the witnesses were subpoenaed. It is apparent the court below accredited trial counsel's testimony on this point and the record supports that conclusion. Appellant has failed to demonstrate deficient performance of counsel.

Next, Appellant claims that counsel's performance was constitutionally deficient because the attorney allegedly failed to conduct adequate meetings with Appellant. Counsel testified that he met with Appellant several times in jail. In addition, counsel met with Appellant before each of Appellant's numerous court dates. Counsel also spoke with Appellant over the phone whenever Appellant wanted an update on the status of his case. Finally, counsel maintained communication with Appellant by sending members of his office to the jail to obtain any new information from Appellant and to check on locating possible defense witnesses. Again, it is apparent the trial judge accredited trial counsel's testimony regarding his communications with Appellant. Appellant has failed to carry his burden of proof with respect to this allegation.

Appellant also alleges that counsel's performance was ineffective because he failed to provide Appellant with any pre-trial motions or pleadings. Counsel testified that he did in fact file several motions on behalf of Appellant. There was no testimony to indicate whether or not counsel furnished these to Appellant. However, counsel did discuss trial strategy and all possible defenses with Appellant and kept Appellant up to date on the status of his case. Appellant has failed to meet his burden of showing that counsel's performance in keeping Appellant apprised of the status of the case was deficient.

Another ground of counsel's alleged ineffectiveness relates to counsel's formulation of a trial strategy. After considering the weight of the evidence against Appellant on each of the charges against him, Appellant's prior criminal history, and Appellant's exposure to imprisonment, counsel decided that it was best for Appellant to accept the State's offer of twenty-five years for all six indictments. As for the cocaine possession charge, counsel believed that the State had a strong case. Appellant had been pulled over by the police for speeding and was arrested when police discovered an outstanding aggravated assault warrant for Appellant's arrest. Upon towing and taking inventory of the contents of the automobile, the police discovered fourteen grams of cocaine. Counsel did not believe that there was a viable defense to this charge. Counsel testified that the aggravated assault charges were substantial since there were four eyewitnesses for the prosecution. As for the murder in the first degree charge, which was later dropped to second degree murder as part of the State's negotiated plea, the State had one witness to testify that Appellant shot the victim and another who put Appellant at the scene of the crime. Counsel testified that the murder charge was potentially defensible since the State's witnesses were impeachable and another eyewitness stated that Appellant was not the gunman. However, at the time of Appellant's plea, Appellant faced eleven years in prison for two aggravated assault convictions, and a plea of guilty to escape. It was counsel's opinion that Appellant faced too much exposure from the six indictments to fight them all at trial.

Because of Appellant's exposure, counsel advised Appellant to accept the State's plea. On the possession charge, Appellant faced twelve to twenty years. On the three aggravated assault charges, Appellant faced six to ten years for

each charge. On the murder in the first degree charge, Appellant faced life imprisonment or the death penalty. Clearly, it was reasonable under the circumstances to advise Appellant to accept a guilty plea which resulted in a twenty-five year sentence. This Court will not second guess the reasonable strategic and tactical decisions of counsel. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (citing United States v. DeCoster, 487 F.2d 1197, 1201 (D.C.Cir. 1973)).

Trial counsel's representation was well within the range of competence demanded of attorneys in criminal cases. Accordingly, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

DAVID H. WELLES, JUDGE